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IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1954

EDWARD COCO,
Petitioner,
vs.
FLORIDA.

PETITION FOR WRIT OF CERTIORARI

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE UNITED STATES:

Petitioner, Edward Coco, respectfully petitions this Honorable Court for a writ of certiorari to the Supreme Court of Florida, to review its judgment of February 25, 1955, affirming a conviction for second degree murder whereby petitioner was sentenced to life imprisonment.

Summary of the Matter Involved

John Smith was shot and killed in Miami Beach, Florida, on February 1, 1951. His occupation was that of cleaning

automobiles on the street, for such car owners as might require his services. Coco was a prize fight manager, residing in New York. He occupied an apartment, as a tourist, in Miami Beach, with his wife. He drove a Cadillac. On the night of the shooting, Mr. and Mrs. Coco had been out to various places of entertainment.

They arrived home in their car about 6 A.M. John Smith was engaged in attending to cars on the public street, near the home of Coco. The defendant and his wife testified that they did not see Smith, that they drove up, alighted from their car and went home to bed. The witnesses say that Coco spoke to Smith, escorted his wife home, and then returned and shot and killed Smith on the street, for no apparent reason. One of the witnesses, another car washer, fled the scene, was picked up by police in a squad car and was returned to the scene. The police, after failing to obtain admission to the apartment occupied by Mr. and Mrs. Coco secured a pass key, entered and woke up the couple. After a futile search of the apartment for a weapon, Mr. and Mrs. Coco were taken to the police station. The officers later found a gun in the garbage can of a neighbor. The officer who found the gun in the garbage can qualified as an expert and testified, Tr. 364, R. ..., that the gun found by him and turned in was a 38 Smith and Wesson Service revolver. The gun put in evidence was a 32 Colt. The proof failed to connect any particular gun with the crime. Although the prosecution immediately called into service an experienced pathologist and ballistics expert who observed the wounds and had collected the bullets and shells, John Smith may have been killed by means of a forty five automatic pistol. The evidence fails to exclude such possibility.

We copy from the opinion of the State Supreme Court, herein p. A-17:

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"In a garbage can of the apartment adjoining appellant's about eight feet away, an officer saw a paper bag and upon lifting the bag, discovered a gun. He did not touch the weapon but called a police detective and they took the can to a squad car. The detective then carried it to the police station and delivered it to the supervisor of the identification bureau who photographed the gun as it lay in the can. He then took the weapon out of the can by inserting a pencil in the trigger guard, laid it on a table and dusted it for latent fingerprints. He 'lifted' the prints and sent them to the Federal Bureau of Investigation in Washington. Although the police officer who first examined the prints reported that they were not appellant's, the prints were eventually identified as his by a fingerprint expert of the Federal Bureau of Investigation.

"After carefully reviewing the evidence and digesting the question posed by the appellant, we understand that the principal error claimed to have been committed was the introduction of the revolver as evidence of identity of the accused, when no showing had been made that it was the weapon from which the fatal shots had been fired or could have been, or that it was found in the possession of the accused or in the vicinity where the crime was committed. In order to reach such a conclusion it is necessary to discard the testimony of the witnesses who, at the last trial, positively identified the appellant as the person who shot Johnnie Benjamin Smith both when he was standing, or walking, and when he was prone in the street.

"Once this testimony were eliminated, the remainder would fall in the classification of circumstantial evidence, the want of motive would become important, *Bonner et al.* v. *State*, 67 Fla. 492, 65 So. 663, the continuity of the evidence of the State would be broken, and the familiar rule with reference to the quality of circumstantial evidence justifying conviction would be violated.

"If no one saw the appellant fire the gun, certainly the failure to show that the bullets removed from the victim's body were fired from the gun found in the trash can would be such a break in the chain of

evidence as to render the gun and testimony about it inadmissible.

"It could not be argued with any logic at all that if a man is found dead from gunshot wounds, a pistol found in another's possession even, would be evidence that the gun was the murder weapon and fingerprints on it were made by the murderer."

The grand jury indicted Coco for first degree murder. His first trial resulted in a conviction of second degree murder. Upon the reversal of this conviction, the prosecutor filed an information for second degree murder. A second trial resulted in conviction and a life sentence. Coco is on $25,000 surety company bond fixed and approved by the trial judge.

We quote further from the opinion of the State Supreme Court, herein, p. 19-A:

"It is quite true that the witnesses who positively identified the appellant in their testimony at the last trial were so vague in their statements at the first trial that this Court, with three members dissenting, reversed the judgment.

"On the last trial the witnesses admitted the discrepancies apparently without reluctance. They gave the same reason, that they were frightened. Other testimony supports the statements that they were afraid. A police officer told how one witness ran away from him and had to be captured; how the witness was finally subdued only when the officer sat upon him. The same witness tried to escape from the police station when appellant appeared there, and was restrained by an officer.

"But the question is whether or not this Court can as a matter of law disregard the second stories, much as they contradict the first ones, and when that is done, hold that the admission of the gun was so improper as to constitute prejudicial error requiring a reversal.

"We do not understand that such is our province.

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"It is elementary in our jurisprudence that the credibility of the witnesses and weight to be given their testimony are questions for the jury to determine. The conflicts between their testimony at the last trial and their testimony at the first trial and the preliminary hearing were an appropriate subject for debate and knowing as we do the talent and experience of appellant's attorney, we have no doubt that the matter was thoroughly presented on appellant's behalf.

"The jury chose to believe the witnesses and, presumably, to accept the excuse given.

"When the case was here before, the judgment was reversed for a new trial, largely because of the unsatisfactory nature of the identification. At this new trial this evidence became unquestionably stronger. If the jury believed it, as the jury had the right to do, the gun was properly introduced and the whole evidence justified the verdict.

"In conclusion, we repeat that in an earnest effort to pass upon the correctness of the judgment with appellant's question ever before us, we are of the opinion that once the credibility of the testimony of the two witnesses is decided to have been a matter for the jury, the other elements become impotent and the challenge fails."

It is the respectful contention of Coco that these witnesses who identified him as the murderer committed perjury. Further that the prosecuting authorities knowingly made use of such perjured testimony. It is submitted that the record will support these charges. During the testimony of Williams, upon cross-examination, he admitted he had committed perjury on the question of the identity of Coco three times. Tr. pps. 82, 83, 85, 86, 95, 96, R. pps. ..., ..., ..., ..., ..., ... In addition, the foundation was laid and he was later impeached by previous testimony eight times. Tr. pps. 401, 402, 403, 406, 407, 408, R. pps. ..., ..., ..., ..., ..., ... The witness Hardy admitted that he had previously committed perjury, on the question

of the identity of Coco, thirteen times. Tr. pps. 180, 181, 182, 183, 184, 185, 187, 188, 304, 305, R. pps. ..., ..., ..., ..., ..., ..., ..., ..., ..., ... Hardy had not been produced in the first trial.

Again we quote from the opinion of the State Supreme Court, herein, p. 14-A:

> "Because of the complex nature of the sole question presented to us for consideration and determination, we quote it in full:
>
> > " 'In a homicide prosecution, where the record utterly fails to disclose a motive on the part of accused, and where the accused and his wife positively testify that accused was not the perpetrator of said homicide, or even present at the time, and where, upon the record, the sole question presented to the jury is the identity of the accused, and where the two purported eye-witnesses who purport to identify the accused admit that they previously committed perjury on the very question of accused's identity, in the same case and where both of said identifying witnesses are thoroughly impeached, and where their testimony bears the earmarks of falsity, and in many aspects is vague, uncertain and contradictory, is it not error for the trial court to allow, over the accused's objection, the introduction into evidence of a gun and evidence of fingerprints by the fingerprint expert, about prints purportedly lifted from said gun when no showing is made that (1) said gun was found on the accused or in the vicinity of the place where the crime was committed and (2) where no showing is made that said gun was the actual homicide weapon, or even that it could have been, when said gun and fingerprint testimony has the natural effect of (1) furnishing purported substantive evidence of the accused's identity or, (2) of corroborating the said discredited eye-witnesses' identification of accused?'
>
> "Before analyzing the question and judging its elements by the evidence in the case, we draw attention to a concession and a statement in appellant's

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brief which materially simplifies our task. He concedes that 'The record is entirely free of any conflict or dispute as to the facts on every material element of the crime of murder in the second degree, except the identity of the accused.' He states that both of the 'witnesses for the State, while positively identifying this appellant as the man who fired the shots which killed the decedent,' admitted that they had previously committed perjury in testifying to this issue at the former trial and the preliminary hearing; that their testimony was contradictory within itself; that it was refuted, in part, by other State witnesses; and that 'in some aspects' it was vague, uncertain, and bore the earmarks of falsity.

"Bearing in mind these representations, we advert to the question to extract the pivotal points on which the decision must hinge. We gather that it is appellant's position that as the testimony of the two witnesses as to identity was so inconclusive, the court erred when it permitted the State to introduce the gun in evidence and allowed testimony about fingerprints found on the gun which had the effect of identifying the accused or corroborating the witnesses on the matter of identity."

The trial attorney for the State prevailed upon the trial court to admit the gun on the claim that he intended to prove it to be the murder weapon. The proof failed. After the jury made use of the gun and the fingerprint evidence, to establish the identity of Coco, as the murderer, the Attorney General, in the Supreme Court abandoned the claim that the gun had been the murder weapon, and caused the Supreme Court to affirm, on the ground that the finding of the gun may have shown that Coco had been recently in possession of a weapon, capable of accomplishing the murder. This theory was refuted by the evidence, which in effect eliminated the possibility of the gun as the weapon used. The gun and the fingerprint evidence was not admissible on any proper theory, yet such evidence brought about this conviction.

Your Honors will have noticed that Judge Thomas concluded his opinion as follows, herein p. 20-A:

> "In conclusion, we repeat that in an earnest effort to pass upon the correctness of the judgment with appellant's question ever before us, we are of the opinion that once the credibility of the testimony of the two witnesses is decided to have been a matter for the jury, the other elements become impotent and the challenge fails."

This is contrary to the manner in which Your Honors examine similar questions. If this rule were applied here a coerced confession could not be deemed error in the face of other testimony of guilt.

Questions Presented

1. Did the introduction of the gun in evidence, together with fingerprints, result in weighing the scales to the prejudice of the defendant?

2. The gun was admitted in evidence on the claim that it was the murder weapon. The proof failed in this regard and contradicted the claim. The Florida Supreme Court sanctioned the admission of the gun on a theory different than that adopted in the trial court. Is it not true that the jury accepted the gun in accordance with the purpose asserted by the prosecutor, as evidence of identity and of guilt?

3. Assuming, as we do, that the trial court erred in admitting the gun and the fingerprint evidence, also that the Supreme Court of Florida erred in affirming the judgment, based upon such incompetent evidence, has there been a violation of due process, as guaranteed by the Fourteenth Amendment?

4. If the question submitted to the State Supreme Court and set out in its opinion were here repeated, would not Your Honors be compelled to answer in favor of Coco?

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5. Is it not true that the Fourteenth Amendment commands that standard of fairness, the failure to observe which would offend men's sense of the decencies and proprieties of civilized life?

6. The States need not adopt any particular form of trial, but is it not true that whatever the form or method of procedure adopted, they remain always subject to the prohibition against that which is commonly thought essentially unfair to him who is to be afforded a hearing?

7. If it be true and shown by the record, as contended by Coco, that the State prosecuting officers knowingly used perjured testimony as a basis of conviction, should not this Honorable Court hold that rights guaranteed by the Fourteenth Amendment have been violated, where it appears, from the record that such federal constitutional claim has been denied by the State Courts?

8. Has Coco received hearings consonant with standards accepted by this Nation as adequate to justify his conviction?

9. The State Supreme Court, after holding that the credibility of the eyewitnesses was for the jury held further that the other elements became impotent. Is not this contrary to due process and in conflict with the decisions of this Honorable Court?

Jurisdiction Invoked

The jurisdiction of this Honorable Court is invoked under Title 28, Judicial Code and Judiciary § 344 United States Code, Judicial Code 237. The judgment was entered February 25, 1955.

Opinions Below

The trial court rendered no opinion. Two opinions by

the Supreme Court of Florida are appended here. The first has been reported, *Coco* v. *State*, 62 So. 2nd 892. The second is unreported at this date.

Statement

Your Honors will notice that the Supreme Court of Florida divided. Mr. Justice Hobson wrote the opinion in the first case, herein, p. 1-A. Judge Thomas was included among the dissenters, herein, p. 12-A. Concerning the second opinion, written by Judge Thomas, herein, p. 13-A, Judge Hobson wrote a separate opinion concurring, herein, p. 20-A, in which Judge Hobson said he was not without some misgivings. We are quite certain that Judge Hobson appreciated to some extent, the force of the claim made by Coco that he had been denied due process.

Your Honors, no doubt, will study the entire opinion rendered by Judge Hobson, from which we quote, herein, p. 21-A:

> "It is indeed a serious matter for any citizen to be deprived of his liberty for the remainder of his life—particularly in this case, where it is more than possible that the jury unwittingly considered circumstantial evidence for an improper purpose."

We quote from Mr. Justice Roberts, dissenting, in *Snyder* v. *Massachusetts*, 291 U.S. 97, 132:

> "But documents, plans, maps, photographs, the clothing worn by the victim and by the perpetrator of the alleged crime, *the weapon used*, and other material objects may be more potent than word of mouth, to carry conviction, to the jury's mind; and so of the physical appearance of the scene of the crime." (Italics ours.)

As we understand the majority opinion of the Florida Supreme Court, Mr. Justice Thomas concludes that the

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jury believed the witnesses who identified Coco, consequently it did not matter that the gun and fingerprints had been put in evidence. The position of the prosecutor is shown in the transcript, p. 256, R.., where he claimed in the trial that the gun was the murder weapon and had been in the possession of Coco. There can be no doubt that such was the conclusion of the jury. The record shows this position to be unfounded. The Florida Supreme Court approved of the admission of this incompetent evidence upon a theory unthought of in the trial court.

Judge Thomas assumes further as a fact that the witnesses observed Coco in the act of shooting *this particular gun*. No such claim was made at the trial. The facts and circumstances in proof negative any such conclusion.

Your Honors will find that the record has been well preserved concerning objections to this incompetent evidence, including the claim made in the trial court that rights guaranteed Coco by the Fourteenth Amendment had been violated. Tr. 472, R. ..., Motion for new trial, points 17 and 18. Denied Tr. 476 R. .... Grounds for appeal, Tr. 492, R. ..., points 9 and 10. Tr. 371, R. ..., objections to fingerprint testimony. Tr. 376, R. ..., motion to strike. Tr. 381, R. ..., motion for directed verdict at end of case for the State, renewed and overruled Tr. 448, R. ..., Motion for new trial. Tr. 469, R. .... Motion to strike re gun Tr. 384, 385, 387, R. ..., ..., ...

It will be observed, from the record, that the principal claims here made by Coco are not based upon conflicts in evidence. Assuming everything testified to by the State witnesses to be true concerning the gun, it was improperly admitted in evidence.

Judge Thomas includes the following, herein, p. 15-A:

> "The want of motive and the assertion of appellant's innocence help us little in deciding the immediate point of law."

We trust that Your Honors will not agree. It is the respectful contention of Coco that questions of law must be decided after the evidence is appraised. The want of motive and the assertion of innocence should be of some help in arriving at a just decision.

We quote further from the opinion by Judge Thomas, herein, p. 18-A:

> "If no one saw appellant fire the gun, certainly the failure to show that the bullets removed from the victim's body were fired from the gun found in the trash can would be such a break in the chain of evidence as to render the gun and testimony about it inadmissible."

Your Honors will note the error made by Judge Thomas, in jumping to the conclusion that the witnesses saw Coco fire the gun in evidence.

As Your Honors will perceive, the Florida Supreme Court first accepts the truth of the identification witnesses and then proceeds to hold the error of the gun to be harmless. We know, from the record, as feared by Judge Hobson, that the gun may have been thrown in the scales by the jury, as of more value than the witnesses.

If we understand Judge Thomas, it is stated in his opinion, herein, p. 18-A, that a pistol found in another's possession would not be evidence that the gun was the murder weapon and fingerprints on it were made by the murderer.

Judge Thomas requires the conclusions and assumptions of which complaint is made here.

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We realize that Your Honors cannot ordinarily review a decision of a state court as to the admissibility or sufficiency of evidence. But where a federal question is involved, Your Honors may review a decision of a state court on a question pertaining to evidence. 36 C.J.S., § 270, p. 172. On the matter of the gun the following authorities were submitted to the State courts. 22 C.J.S., p. 1210, 16 C.J. 618, Section 1225, 22 C.J.S., p. 1210, Wigmore on Evidence, Vol. 7, 3rd Edition, p. 569, *State* v. *Hasock,* 116 Iowa 194, 89 N.W. 1077, *People* v. *Hill,* 56 P. 443, *State* v. *Concord,* 154 N.W. 763, *Parrot* v. *Commonwealth,* 47 S.W. 453, *People* v. *Berkman,* 139 N.E. 91, *State* v. *Kehr,* 110 N.W. 149, *Fuller* v. *State,* 110 So. 528, *Green* v. *State,* 17 Fla. 669, *Council* v. *State,* 149 So. 13, *Hoag* v. *State,* 149 So. 566, *Calloway* v. *State,* 152 So. 429.

We quote from Judge Thomas, herein, p. 19-A:

> "Our trouble in following the appellant's reasoning and adopting his conclusion comes from our inability to accept his premise."

The premise, as we gather it from the record, is that a gun shown to be different from that found was introduced in evidence. This gun put in evidence was not the murder weapon and was not found in the possession of the defendant. The failure, or refusal, of Judge Thomas to accept these facts is one reason for our being here.

Judge Thomas boiled the matter down concerning the identifying witnesses, herein, 19-A:

> "But the question is whether or not this Court can as a matter of law disregard the second stories, much as they contradict the first ones, and when this is done, hold that the admission of the gun was so improper as to constitute prejudicial error requiring reversal."

Here again, with all due respect, Judge Thomas has missed our main point. The gun caused the jury to con-

clude that Coco was guilty. Without the gun the witnesses would not have been believed. The gun resulted in conviction.

Your Honors will note that Judge Thomas concluded from the record that these eyewitnesses admitted freely, herein, p. 16-A, without hesitation, herein, p. 16-A, and without reluctance, herein, p. 19-A, that previous testimony had been perjury. Your Honors have the record. The witnesses when confronted with previous perjury were not free to admit. Hesitation and confusion is obvious. They were at a loss to explain. Their claim that they were frightened just does not fit as an excuse for perjury committed long after original fright engendered possibly by having been in the vicinity of gun fire.

It may be helpful for Your Honors to make a study of the opinion rendered by Judge Hobson when this case was first reversed by the Florida Supreme Court, herein, p. 2-A:

> "Numerous assignments of error were filed by the appellant and predicated upon said assignments of error counsel for appellant posed several questions. We shall deal with but two of these questions, namely, questions numbered 1 and 5. These questions read respectively as follows (Italics in original):
>
> > 1. 'Where the testimony utterly fails to show any motive of any kind on the part of the defendant to take the life of deceased or to do him any bodily harm at all; and where the testimony of only one witness purported to place the defendant at the scene of the homicide at the time of the fatal shooting, and this witness was a long-time friend and employee of the deceased, and the testimony of this witness identifying the defendant is not only *uncorroborated*, but is *weak, uncertain and unconvincing*, and shows it is based upon *guesswork and conjecture and bears the earmarks of falsity* and is thoroughly *impeached* by the testimony of a white lady, testifying as a State witness, is not such evidence legally insufficient to support a verdict of

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guilty and do not the ends of justice require the granting of a new trial?'

5. 'Where the State places upon the stand a finger-print expert who testifies upon direct examination minutely and in detail to lifting finger-prints from the pistol which was admitted in evidence upon the theory that it was the murder weapon, and who testified as to comparison of finger-prints which had been admitted in evidence, is it not prejudicial error for the trial judge to deny defendant's counsel the right on *cross-examination*, to ask said expert if he did not, *immediately after lifting said finger-prints from said weapon*, compare the same with the finger-prints of defendant, and from such comparison at said time find that the same did not correspond, and if he did not at said time, from such comparison, find such difference and divergence in said finger-prints as to cause him, as such expert, to conclude that the finger-prints which he had lifted from said weapon were NOT defendant's and had not been made by defendant?'

"It is the contention of counsel for appellant that both of these questions which were answered in the negative by the trial judge should have been answered in the affirmative. It is the position of counsel for the State that if errors were committed in the trial of this case no one of the alleged errors was harmful or prejudicial to appellant and that he did receive a fair and impartial trial. However, upon a careful consideration of the record as a whole, We are forced to a contrary view.

"The Attorney General takes the position that Question No. 1 as posed by counsel for appellant is not supported by the record except insofar as it states that there was no showing of motive for the crime and that there was apparently only one witness who could place the appellant at the scene of the homicide at the time of the fatal shooting." * * *

"It is contended by counsel for the State that if error was committed by the trial judge in refusing to allow the cross-examination which was sought to be made by counsel for appellant it was not harmful error because the State established the identity of Edward

> Coco by the testimony of an eye witness, Herbert Williams, a colored man who worked for the deceased, Johnnie Smith. An examination of the testimony given by Williams both on direct and cross-examination convinces us that although it might be said standing alone it was sufficient, if believed by the jury to establish the identity of Eddie Coco as the person who shot and killed Johnnie Smith, such testimony was not of the strong character required by the law in a criminal case and its weakness, uncertainty and the conflicts therein would have been all the more obvious and discrediting to his testimony, had Lieut. Simmons been permitted to testify on cross-examination, and if he had testified as counsel for appellant stated to the trial court he would have testified, which we must assume he would have done." * * *
>
> "It appears to be the position of counsel for the State that if there be an eye witness to the commission of a crime, however weak his testimony might be, such fact is ample justification for this Court to ignore the absolute right of cross-examination (which our Declaration of Rights purports) of other witnesses who have testified upon, as in this case, the vital question of identity of the accused as the perpetrator of the heinous crime of murder. This contention is so patently, egregiously erroneous as to require no authority to point out its obliquity."

As Your Honors will perceive, the first time around the Attorney General of Florida failed to convince the Supreme Court that the testimony of the eyewitness was sufficient to overcome the harm done by error. In the second time around the Florida Supreme Court concluded that the testimony of the eyewitnesses had been improved to the extent that errors did not matter. It is our respectful contention that the testimony of the eyewitnesses had been further damaged.

We quote further from Judge Thomas, herein, p. 20-A:

> "When the case was here before, the judgment was reversed, largely because of the unsatisfactory nature of the identification. At this new trial this evidence

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> became unquestionably stronger. If the jury believed it, as the jury had the right to do, the gun was properly introduced and the whole evidence justified the verdict."

If we understand the plain English of the above quotation, it means that Judge Thomas has accepted the testimony of the eyewitnesses, that Coco is in fact the murderer, so therefore incompetent evidence was properly introduced. This, we submit, is so far out of line with established practice and fairness, to require Your Honors to hold that due process has been denied.

We again quote from Mr. Justice Hobson, herein, p. 21-A:

> "The only purpose for which the pistol *might* properly have been introduced would have been to show that the appellant had the means of committing the homicide. This is the main premise upon which the State resolutely stands, but the record does not suggest that such position was taken at the *trial* level.
>
> "Since it is true that reasonable minds might differ upon the question whether or not the evidence in this record is sufficient to permit a *reasonable* inference of the *probability* that the 32 Colt revolver was used to commit the crime the determination of such question would have been for the jury had the members thereof been definitely aware of the fact that the revolver was not admissible as the murder weapon, but only for the purpose of demonstrating that the defendant possessed the means with which to commit the crime. But the record fails to disclose that such was the case." (Italics are in original.)

Judge Hobson has stated, herein, p. 21-A, that he would vote for reversal if he believed the error to be fundamental and not procedural. Of course Coco had a right to procedural due process also. *American Surety Co.* v. *Baldwin,* 287 U.S. 156. We respectfully contend that the error really was fundamental. Judge Hobson further states that he has been influenced by the stamp of approval given by

an able experienced trial judge. Of course that should be given some weight, but we all make mistakes. The right to appeal would have little value if it be assumed that the trial judge has been correct.

We are quite certain that a study of the various opinions rendered in the Supreme Court of Florida will disclose our point here. It all boils itself down to the question of whether justice has been done and Coco was in fact afforded due process.

Your Honors indicated in *Mooney* v. *Holohan*, 294 U.S. 103 that a criminal conviction procured by the state prosecuting authorities, solely by use of perjured testimony, known by them to be perjured and knowingly used by them in order to procure the conviction, is without due process of law and in violation of the Fourteenth Amendment. In order to impel Your Honors to notice this case, Coco makes two serious charges. The witnesses committed perjury and the prosecutors had guilty knowledge. The admission of the witnesses that they did commit perjury in previous hearings may be regarded as an attack upon their credibility. It is possible that they lied under oath previously and told the truth at the trial. The State Supreme Court accepted the reason given by these witnesses, for previous falsehoods, that they were afraid. Your Honors should be free to conclude that they told the truth under oath in the first instance and have committed perjury on the trial. That is the contention of Coco and we should very much desire an opportunity to argue this position from the record.

It is a serious charge to make against prosecutors that they knew of perjury, but we hope that Your Honors will assume that the prosecutors knew of previous testimony. It is fair to conclude that the prosecutors knew that the improvements upon this testimony constituted perjury.

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We direct the attention of Your Honors to that said by Judge Hobson in the first opinion, herein, p. 3-A. We quote only a portion of the opinion rendered by Judge Hobson, herein, p. 8-A:

> "The question of the identity of Eddie Coco as the slayer of Johnnie Smith was the most vital one presented to the jury in this case. The testimony on the question of identity might well have been determined differently, had the cross-examination of Simmons been allowed, for there would have been a conflict in the testimony on this most important query, which would have been of inestimable value to appellant. Our thought in this connection is greatly strengthened, if indeed it is not completely upheld, by the admission of the Attorney General in his brief to the effect that, and we quote:
>
> > " 'If the proffer may be taken as true, Lt. Simmons would have been a most valuable witness for the defense. He was qualified as a finger-print identification expert. By the terms of the proffer, his expert opinion was in direct conflict with the opinion of the Federal Bureau of Identification expert, Ronald G. Wittmus. * * * The decision of the defense not to call this valuable witness, who was so readily available, must certainly have been the result of carefully reflected trial strategy. *We can only conjecture or surmise what the outcome would have been if he had been called. (Italics supplied.)*'
>
> "We are constrained to paraphrase the last sentence of the above quotation and say we can only conjecture or surmise what the outcome would have been had the appellant been granted, rather than denied, his inalienable right of cross-examination.
>
> "The line of cross-examination which counsel for appellant was attempting to initiate and pursue should have been permitted either for the purpose of showing fully and completely what the witness did with, and in connection with, the taking of the finger-prints, including the making of the report, to the end that he might have been impeached either in connection with

his direct testimony to the effect that both finger-print cards contained the finger-prints of the same person, to-wit: Eddie Coco, or for the purpose of laying a predicate for impeaching the witness himself by the production of the report which it is contended he did make to the Chief of Police in the event he denied having made such a report containing a statement contrary to his direct testimony."

Now that Your Honors have the record, Your Honors know that this policeman testified in the second trial that after he made a formal report that the fingerprints were not made by Coco, he realized that he had made a mistake, upon second thought he concluded that they were fingerprints made by Coco. His testimony in the second trial explains why Coco did not call him in the first. The Attorney General, when he argued in the first case that Coco should have called this policeman must have known that Lieut. Simmons would have claimed in the first trial that he had made a mistake and had changed his mind.

A jury can be expected to rely upon an F.B.I. fingerprint expert, but Your Honors will perceive from the record that the federal agent had no first hand knowledge of where the fingerprints were obtained. Your Honors will know better than to trust Lieut. Simmons upon any vital fact, without corroboration. To say that the Miami Beach police department bungled the whole thing does not help Coco much. The gun found in the garbage can had been cleaned and a particular oil was present. Either Coco cleaned it and had oil on his hands, or his hands had been washed. The police know a test to determine if a person has recently fired a gun. The record is silent. Either the test was made and was negative, or it was not made. We do not know from the record. Bullets were obtained from the body; one from the street. Shells were found on the street, indicating use of an automatic pistol. The absence of expert

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testimony to connect the gun in evidence with the murder should cause Your Honors to conclude, as a certainty from the record, that the gun found in the trash can was not the murder weapon. As Judge Hobson has pointed out, the gun was admitted in evidence at the trial level on one claim and affirmed by Judge Thomas upon an entirely different theory. The importance of this switch is vital, when Your Honors keep in mind the use made of the gun by the jury.

The 32 caliber Colt revolver admitted in evidence against Coco was offered by the State for the sole purpose of showing it to be a homicide weapon to identify the accused from the fingerprints supposedly lifted therefrom. On page 256 of the transcript of the record, R. ..., the County Solicitor, in a proffer, made the following statement to the court, after having proffered to prove that two exploded shells of the 32 caliber pistol had been found in the entrance pathway to the accused's apartment house.

> "We propose to show the pistol used in the slaying of the deceased, Johnny Smith, was by reason of the bullet fired from the 32 caliber pistol. We further propose to show the pistol taken out of the garbage can was by general custom checked and that the fingerprints found on that pistol are the fingerprints of the defendant, and by reason of the lifting made by the Police Department of Miami Beach and examined by the F.B.I. Fingerprint Expert, the information was filed."

In other words, the County Solicitor stated he proposed to introduce the actual death weapon used in the slaying of the deceased, and to show that the fingerprints of the accused were thereon, and that hence, Coco was the slayer. Notwithstanding the above proffer and the subsequent use of this weapon and the fingerprints allegedly found thereon, by the County Solicitor for the purpose of actually

identifying the accused, the record wholly fails to disclose any evidence, as stated above, that said weapon was, or even could have been the death weapon.

The practice of calling out evidence for one purpose and later, on appeal, contending the evidence to be proper for quite another and unthought of purpose, is not new. This has been attempted in the past and the courts have condemned this practice in no uncertain terms. *People* v. *Zackowitz*, 254 N.Y. 192, 172 N.E. 466, *Shepard* v. *United States*, 290 U.S. 96. Your Honors are presented here, for the first time, insofar as we know, the question as to whether such practice violated due process under the circumstances of this case.

Reasons for Granting Writ

1. The writ of certiorari is sought because the issues presented herein raise important questions of Federal law.

2. The State Supreme Court of Florida has decided a federal question of substance not heretofore determined by this Honorable Court.

3. The State Supreme Court has decided this case in a way not in accord with applicable decisions of this Honorable Court.

4. It is very possible that Coco may be innocent. The use of incompetent and knowingly perjured evidence should be the concern of this Honorable Court.

5. We respectfully submit that we have made sufficient showing to cause Your Honors to conclude that Coco is entitled to have Your Honors look further into his claim that he has been denied substantial federal rights.

6. When the State Supreme Court determined to accept the testimony of the eyewitnesses and therefore ruled the

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matter of the gun impotent, due process was denied and a conflict has arisen with the law as settled by this Honorable Court.

Conclusion

We trust we have sufficient showing to require Your Honors to permit us to proceed further. We pray for an opportunity to brief the case and to argue before Your Honors that Coco has in fact been deprived of due process. In *Snyder* v. *Massachusetts*, 291 U.S. 97, Your Honors allowed certiorari after a conviction had been affirmed by the State Supreme Court. The point there was different, but the ultimate question concerned the claim that the State had departed from due process. In the cases involving the right of counsel, and the admission of involuntary confessions, Your Honors have likewise taken cases, after affirmance in State Supreme Courts. This case is different, but our claim for the right to appear here is the same principle. In *Moore* v. *Dempsey*, 291 U.S. 87, Your Honors indicated that even if a record made in the State Court appeared good on its face, federal courts should still look to the facts. That said by a State Supreme Court is entitled to considerable respect here, we know, but Your Honors will look to the entire record. Due process is not always denied in the same manner. This is not a case of mere conflicts in evidence. Coco could be in no worse position if the prosecutor had merely informed the jury that the authorities believed Coco to be guilty, but as the proof is weak and unsatisfactory it was required to accept such opinion as well founded. Your Honors are familiar with the rules concerning circumstantial evidence. As this record is studied, many reasonable conclusions will be suggested by the facts, including the possible innocence of one convicted and sentenced to life imprison-

ment. We trust that Your Honors will see fit to grant us the privilege of an argument on this possibility.

It may be true, as the Attorney General suggested that the bungling of certain police officers and state witnesses prevented the State from proving the size or caliber of the bullets taken from the body. No amount of bungling can relieve the burden on the State to prove its case, or operate to admit improper evidence.

As we have pointed out, Judge Thomas said, herein, p. 20-A:

> "At this new trial this evidence became unquestionably stronger."

Your Honors have examined a large number of opinions. Can Your Honors recall a case in which evidence which had been unproved was regarded as reliable? Who caused the evidence to be changed? Why was it changed? We respectfully submit that it is not a far step to conclude from the record that Coco has been the victim of a frame-up.

We conclude from a study of the entire record that without the evidence of the gun the jury would not have convicted and the Florida Supreme Court would not have affirmed. We respectfully request Your Honors to again read all of the opinions reported in *Stein* v. *New York*, 346 U.S. 156. Surely Coco is not required to prove that if the evidence unconstitutionally admitted were excised there would not be enough left to authorize the jury to find guilt. But even if such were the rule, we respectfully submit that Coco if given an opportunity here could demonstrate that no dog should be sent to the dog pound on testimony such as given by the confessed perjurers who combined against him. We trust that the sense of justice in Your Honors will be shocked.

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In reversing a murder conviction the Supreme Court of Illinois in *People* v. *Scalisi*, 324 Ill. 131, 151, noted that the sentence to the penitentiary, under the circumstances was but a mockery of justice, if the defendants were guilty.

We respectfully pray for the Writ of Certiorari.

Respectfully submitted,

LOUIS CARBONARO,
Attorney for Petitioner.

IN THE

Supreme Court of Florida

JANUARY TERM, A.D. 1953, *En Banc.*

EDWARD COCO, also known as EDDIE COCO,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

SUPREME COURT No. 23,396

(Italics have been copied as in original opinions.)

Opinion filed January 20, 1953.

An Appeal from the Circuit Court for Dade County.
Grady L. Crawford, Judge

Whitaker Brothers and Hubbard & Carr, for Appellant.
Richard W. Ervin, Attorney General and William A. O'Bryan, Assistant Attorney General, for Appellee.

HOBSON, C. J.:

Appellant (defendant below) was charged with first degree murder in and by an indictment returned by the Grand Jury of Dade County, Florida, on March 29, 1951. He entered a plea of not guilty and the case was then tried before a jury which trial began on June 8, 1951. At the conclusion of the trial the jury returned a verdict of guilty of murder in the second degree. Counsel for appellant in due course filed a motion for a new trial, which motion was denied. On the 18th day of June, 1951, the trial judge entered an order adjudging the defendant guilty of the offense of murder in the second degree and pronounced judgment and sentence in the following language:

> "IT IS, THEREFORE, the judgment of the law and the sentence of this Court that you, EDWARD COCO, also known as E DIE COCO, be, and you are hereby sentenced to confinement in the State Prison at hard labor for and during the term or period of your natural life."

Notice of appeal was filed on June 19, 1951.

Numerous assignments of error were filed by the appellant and predicated upon said assignments of error counsel for appellant posed several questions. We shall deal with but two of these questions, namely questions numbered 1 and 5. These questions read respectively as follows:

> 1. "Where the testimony utterly fails to show any motive of any kind on the part of the defendant to take the life of deceased or to do him any bodily harm at all; and where the testimony of only one witness purported to place the defendant at the scene of the homicide at the time of the fatal shooting, and this witness was a long-time friend and employee of the deceased, and the testimony of this witness identifying the defendant is not only *uncorroborated*, but is *weak, uncertain and unconvincing*, and shows it is based upon *guesswork and conjecture* and *bears the earmarks of falsity* and is thoroughly *impeached* by the testimony of a white lady, testifying as a State witness, is not such evidence legally insufficient to support a verdict of guilty and do not the ends of justice require the granting of a new trial?"

> 5. "Where the State places upon the stand a finger-print expert who testifies upon direct examination minutely and in detail to lifting finger-prints from the pistol which was admitted in evidence upon the theory that it was the murder weapon, and who testified as to comparison of finger-prints which had been admitted in evidence, is it not prejudicial error for the trial judge to deny defendant's counsel the right on *cross examination*, to ask said expert if he did not, *immediately after lifting said finger-prints from said weapon*, compare the same with the finger-prints of defendant, and from such comparison at said time find that the same did not correspond, and if he did not at said time, from such comparison, find such difference and diver-

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gence in said finger-prints as to cause him, as such expert, to conclude that the finger-prints which he had lifted from said weapon were NOT defendant's and had not been made by defendant?"

It is the contention of counsel for appellant that both of these questions which were answered in the negative by the trial judge should have been answered in the affirmative. It is the position of counsel for the State that if errors were committed in the trial of this case no one of the alleged errors was harmful or prejudicial to appellant and that he did receive a fair and impartial trial. However, upon a careful consideration of the record as a whole, We are forced to a contrary view.

The Attorney General takes the position that Question No. 1 as posed by counsel for appellant is not supported by the record except insofar as it states that there was no showing of motive for the crime and that there was apparently only one witness who could place the appellant at the scene of the homicide at the time of the fatal shooting. It is the contention of the Attorney General with reference to Question No. 5 that the witness Lieut. Bruce Simmons, although he was supervisor of the Identification Bureau, Miami Beach Police Department, was placed upon the stand and gave direct testimony for the sole purpose of supplying a clear, definite and certain identification of State's Exhibit No. 8 and of showing that State's Exhibit No. 8 and State's Exhibit No. 3 had been sent to the Federal Bureau of Identification in Washington D. C., and that Lieut. Simmons' testimony was given as a predicate for the subsequent testimony of the fingerprint expert or examiner Ronald G. Wittmus, who was an employee of the Federal Bureau of Identification. Counsel for the State argues that witness Simmons "in no way testified about a comparison made by himself of the finger-prints on State's Exhibit 3 and State's Exhibit 8, nor did he testify as to any opinion he might have reached from such a comparison."

A careful and studied examination of the transcript of record discloses that State's Exhibit No. 1-L for identification was the file copy of the Miami Beach Police Department's State's Exhibit No. 8. Said Exhibit was a copy of finger-prints taken from the pistol by witness Bruce Simmons, according to his own testimony, while State's Exhibit No. 3 was the Washington copy of alleged fingerprints of Coco taken by Officer Gorham on February 1st following the homicide.

Witness Simmons not only testified in detail on direct examination as to the manner in which he lifted the finger-prints from the revolver but he also testified as to what he did with them and he further testified to a comparison between the two exhibits. I quote from the record:

> "Q. (By Mr. DuVal) I show you State's Exhibit No. 1-L for identification, and State's Exhibit No. 3, and ask you what comparison there is in the two?
>
> A. Well, those are both finger-print cards containing the finger-prints of the same person, Eddie Coco."

Counsel for appellant, at the beginning of his cross-examination of Lieut. Simmons, started to ask a question but got no further than the utterance of the following words: "You made a comparison * * *", when the State's attorney interposed an objection. Whereupon the court excused the jury from the court room and after argument of counsel sustained the objection made by the State's attorney on the ground that counsel for appellant did not have the right to cross-examine the witness as he was preparing to do because it was improper cross-examination. He obviously held that there was no direct testimony given by the witness which would justify the proposed cross-examination and that counsel might use Lieut. Simmons as appellant's own witness in order to present to the jury the testimony which he sought to elicit upon cross-

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examination. At this juncture it is deemed appropriate to state just what counsel for appellant intended to bring out by his cross-examination. Counsel proffered "to show, if permitted to examine the witness, that under date of February 1, 1951, Lieut. Bruce Simmons wrote a communication, directed to the Chief of Police as follows: 'At 9 o'clock a.m. this date, Detective William Murray brought a white kitchen-type garbage can to the identification bureau which contained a blue steel Colt pocket positive revolver with a 32 caliber 2½ inch barrel, No. 75611. I have photographed same, as it lay in the garbage can. I checked it for latent prints and found two legible whirls with left delta shown on the cylinder. *These were lifted and they do not compare with those of Eddie Coco, our No. A-17210.* Further examination of the revolver showed that there were no cartridges in the cylinder and that the physical condition of the inside of the barrel, lack of burnt powder smell, absence of burnt power (*sic*) at the muzzle, breech or face of the cylinder, indicates that the revolver has not been fired since last cleaning. However, a ballistics test will establish whether it was used in this case. *The lifted prints do not compare with those of Rosalie Coco, alias Plass, our No. A-17212.* Respectfully submitted, Lt. Bruce Simmons.'" (Italics supplied).

It is our conclusion that the trial judge committed error in not allowing the cross-examination because we are convinced that it was proper cross-examination and that the direct testimony of Lieut. Simmons in which he sketched in part but not *in toto* what he did with—what use he made of—the finger-prints and his testimony hereinabove delineated in which he did make a comparison and testified that both finger-print cards contained the finger-prints of the same person, Eddie Coco, justified the proposed cross-examination.

It is too well settled to need citation of authority that a fair and full cross-examination of a witness upon the subjects opened by the direct examination is an absolute right, as distinguished from a privilege, which must always be accorded to the person against whom the witness is called and this is particularly true in a criminal case such as this wherein the defendant is charged with the crime of murder in the first degree. For the sake of emphasis we make the observation that at the time of the proposed cross-examination appellant stood in jeopardy of being convicted of such capital offense. Cross examination of a witness upon the subjects covered in his direct examination is an invaluable right and when it is denied to him it cannot be said that such ruling does not constitute harmful and fatal error. Moreover, the right of cross-examination stems from the constitutional guaranty that an accused person shall have the right to be confronted by his accusers. We quote with approbation from the Supreme Court of Maine in the case of *State* v. *Crooker, et al.*, 122 Atl. 865:

> "The constitutional right of confrontation does not mean merely that witnesses are to be made visible to the accused, but imports the constitutional privilege to cross-examine them.
>
> "The constitutional right of cross examination is not a mere privilege, to be granted or withheld at the discretion of the court, but a substantive right possessed by the accused."

It is stated in 58 Am. Jur., page 350, Section 629, and we quote with approval:

> "* * * it is error for the trial court to refuse to permit the cross-examination of a witness to extend to all matters germane to the direct examination, for such a cross-examination is a matter of absolute right and is not a mere privilege. * * * if a question is within the scope of direct examination it is not objectionable on cross-examination because it tends to establish a defense to the action."

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It is further stated in the same work in Section 632, page 352:

> "* * * when the direct examination opens a general subject, the cross-examination may go into any phase, and may not be restricted to mere parts which constitute a unity, or to the specific facts developed by the direct examination. Cross-examination should always be allowed relative to the details of an event or transaction a portion only of which has been testified to on direct examination. As has been stated, cross-examination is not confined to the identical details testified to in chief, but extends to its entire subject matter, and to all matters that may modify, supplement, contradict, rebut or make clearer the facts testified to in chief by the witness on cross-examination."

The rule which prohibits proof of defensive matter upon cross-examination never applies where by such cross-examination "the adverse party simply seeks to disprove, weaken or modify the case against him which the witness himself has made." *Resurrection Gold Min. Co.* v. *Fortune Gold Min. Co.*, 129 Fed. 668. See also *Wendt* v. *Chicago St. P., M. & O. Ry. Co.*, 4 S.D. 476, 484, 57 N. W. 226; *Jackson* v. *Feather River W. Co.*, 14 Cal. 19, 24.

It is contended by counsel for the State that if error was committed by the trial judge in refusing to allow the cross-examination which was sought to be made by counsel for appellant it was not harmful error because the State established the identity of Edward Coco by the testimony of an eye witness, Herbert Williams, a colored man who worked for the deceased, Johnnie Smith. An examination of the testimony given by Williams both on direct and cross-examination convinces us that although it might be said standing alone it was sufficient, if believed by the jury to establish the identity of Eddie Coco as the person who shot and killed Johnnie Smith, such testimony was not of the strong character required by the law in a criminal case and

its weakness, uncertainty and the conflicts therein would have been all the more obvious and discrediting to his testimony, had Lieut. Simmons been permitted to testify on cross-examination, and if he had testified as counsel for appellant stated to the trial court he would have testified, which we must assume he would have done.

The question of the identity of Eddie Coco as the slayer of Johnnie Smith was the most vital one presented to the jury in this case. The testimony on the question of identity might well have been determined differently, had the cross-examination of Simmons been allowed for there would have been a conflict in the testimony on this most important query which would have been of inestimable value to appellant. Our thought in this connection is greatly strengthened, if indeed it is not completely upheld, by the admission of the Attorney General in his brief to the effect that, and we quote:

> "If the proffer may be taken as true, Lt. Simmons would have been a most valuable witness for the defense. He was qualified as a finger-print identification expert. By the terms of the proffer, his expert opinion was in direct conflict with the opinion of the Federal Bureau of Identification expert, Ronald C. Wittmus. * * * The decision of the defense not to call this valuable witness, who was so readily available, must certainly have been the result of carefully reflected trial strategy. *We can only conjecture or surmise what the outcome would have been if he had been called.*" *(Italics supplied.)*

We are contrained to paraphrase the last sentence of the above quotation and say we can only conjecture or surmise what the outcome would have been had the appellant been granted, rather than denied, his inalienable right of cross-examination.

The line of cross-examination which counsel for appel-

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lant was attempting to initiate and pursue should have been permitted either for the purpose of showing fully and completely what the witness did with, and in connection with, the taking of the finger-prints, including the making of the report, to the end that he might have been impeached either in connection with his direct testimony to the effect that both finger-print cards contained the finger-prints of the same person, to-wit: Eddie Coco, or for the purpose of laying a predicate for impeaching the witness himself by the production of the report which it is contended he did make to the Chief of Police in the event he denied having made such a report containing a statement contrary to his direct testimony.

In the recent case of *Hahn* v. *State*, 58 So. 2d 188, we had the almost identical question before us and without equivocation we held that it was fatal error for the trial court to deny defense counsel the right of cross-examination for the purpose of laying a predicate for impeachment. The vital question in that case was not one of identity but was whether the defendant killed the deceased while acting in self defense. However, the analogy between that case and the instant suit is so clear-cut as to be unquestioned authority for a reversal herein.

Moreover, the distinction between the two criminal actions consists of a difference which is more favorable to a reversal in the instant, than in the *Hahn* v. *State*, case. The propriety of recalling a witness for the State for further cross-examination after the State has rested its case for the purpose of laying a predicate for impeachment is a matter which rests in the sound judicial discretion of the court. On the other hand, the right of a full and fair cross-examination of a witness upon subjects the door to which is pushed ajar on the examination in *chief* is an

absolute right which has as its genesis Section 11 of the Florida Declaration of Rights. This Section provides that an accused shall have the right "to meet the witnesses against him face to face" in open court before an impartial jury.

It appears to be the position of counsel for the State that if there be an eye witness to the commission of a crime, however weak his testimony might be, such fact is ample justification for this Court to ignore the absolute right of cross-examination (which our Declaration of Rights purports) of other witnesses who have testified upon, as in this case, the vital question of identity of the accused as the perpetrator of the heinous crime of murder. This contention is so patently, egregiously erroneous as to require no authority to point out its obliquity.

Controversy has arisen as to whether State's Exhibit No. 1-L for identification was actually the Miami Beach Police Department's copy of State's Exhibit No. 8 which unquestionably contained the finger prints that were lifted from the pistol by the witness Lieut. Bruce Simmons or whether said State's Exhibit 1-L for identification was a finger print card containing the known finger prints of Eddie Coco which had for an indefinite and unexplained period of time been in the file of the Miami Beach Police Department. The record does not contain State's Exhibit 1-L for identification. We have endeavored to secure from Hon. E. B. Leatherman, Clerk of the Circuit Court of the Eleventh Judicial Circuit, State's Exhibit 1-L for identification but have been informed that since it was not actually introduced in evidence it was not retained among the Clerk's records. We are forced to look to the testimony of Lieut. Bruce Simmons in order to determine just what said exhibit actually was. The writer, on several occasions, has

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carefully studied the testimony of Lieut. Simmons as it appears in the transcript of record and can reach no other conclusion but that State's Exhibit No. 1-L for identification was the file copy of the Miami Beach Police Department's State Exhibit No. 8 which contained the finger prints that were lifted from the pistol by Lieut. Simmons.

However, in order that our position may be crystal clear, we wish it to be understood that in our opinion harmful and reversible error was committed in the trial court when the cross examination sought to be made was denied counsel for appellant, regardless of what State's Exhibit No. 1-L for identification may have been. We hold this view because without consideration being given to the comparison made by Lieut. Simmons between State's Exhibit No. 1-L for identification and State's Exhibit No. 3 the cross examination was proper and should have been permitted because Lieut. Simmons opened the door to such cross examination when he testified minutely as to just what he did in the process of lifting the finger prints from the pistol and also testified as to what he did with, and what use he made of, the self-same finger prints. He purportedly gave the jury a complete picture of his every act from the time he started the technical process of removing the finger prints from the pistol on down to having sent to the F. B. I. at Washington those finger prints and the finger prints of one Edward Coco taken by Officer Gorham on February 1st (State's Exhibit No. 3) as well as a duplicate copy of either State's Exhibit No. 8 or, if we are wrong in our appraisal of the testimony, that which he sent was a copy of the Miami Beach Police Department's finger print card of Edward Coco which had been on file with said Police Department. After Lieut. Simmons testified minutely as to what he did with the finger prints which he lifted from the pistol defense counsel certainly should have been accorded the

constitutional right of cross examination to determine whether he had done anything else with said finger prints and had the right to find out everything he did with the finger prints since he had told on direct examination some, but not all, of the things which he did with and concerning said finger prints.

It follows that our judgment is one of reversal.

Reversed for a new trial.

ROBERTS, MATHEWS and DREW, JJ., CONCUR.

TERRELL, THOMAS and SEBRING, JJ., DISSENT.

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IN THE

Supreme Court of Florida

JANUARY TERM, A.D. 1955. *En Banc.*

EDWARD COCO, also known as EDDIE COCO,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE No. 25,882

Opinion filed February 25, 1955.

An Appeal from the Criminal Court of Record for Dade County.

Ben C. Willard, Judge.

Whitaker Brothers, Mark R. Hawes and Robert R. Taylor, for Appellant.

Richard W. Ervin, Attorney General and Bart L. Cohen, Assistant Attorney General, for Appellee.

THOMAS, J.:

There can be no doubt that Johnnie Benjamin Smith was murdered in a street of the city of Miami Beach 1 February 1951.

The appellant was charged with the death of Johnnie Benjamin Smith and indicted for murder in the first degree. The jury returned a verdict of guilty of murder in the second degree and the appellant was sentenced to imprisonment for life. The appellant appealed from that judgment

and secured a reversal for a new trial. *Coco* v. *State*, (Fla.) 62 So. 2d 892. Terrell, Thomas and Sebring dissenting.

An information was then filed in the Criminal Court of Record charging appellant with murder in the second degree. He was found guilty, as charged, by a jury and sentenced to life imprisonment.

From that judgment he now appeals.

Because of the complex nature of the sole question presented to us for consideration and determination, we quote it in full:

> "In a homicide prosecution, where the record utterly fails to disclose a motive on the part of accused, and where the accused and his wife positively testify that accused was not the perpetrator of said homicide, or even present at the time, and where, upon the record, the sole question presented to the jury is the identity of the accused, and where the two purported eye-witnesses who purport to identify the accused admit that they previously committed perjury on the very question of accused's identity, in the same case and where both of said identifying witnesses are thoroughly impeached, and where their testimony bears the earmarks of falsity, and in many aspects is vague, uncertain and contradictory, is it not error for the trial court to allow, over the accused's objection, the introduction into evidence of a gun and evidence of fingerprints by the fingerprint expert, about prints purportedly lifted from said gun when no showing is made that (1) said gun was found on the accused or in the vicinity of the place where the crime was committed and (2) where no showing is made that said gun was the actual homicide weapon, or even that it could have been, when said gun and fingerprint testimony has the natural effect of (1) furnishing purported substantive evidence of the accused's identity or, (2) of corroborating the said discredited eye-witnesses' identification of accused?"

Before analyzing the question and judging its elements by the evidence in the case, we draw attention to a conces-

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sion and a statement in appellant's brief which materially simplifies our task. He concedes that "The record is entirely free of any conflict or dispute as to the facts on every material element of the crime of murder in the second degree, except the identity of the accused." He states that both of the "witnesses for the State, while positively identifying this appellant as the man who fired the shots which killed the decedent," admitted that they had previously committed perjury in testifying to this issue at the former trial and the preliminary hearing; that their testimony was contradictory within itself; that it was refuted, in part, by other State witnesses; and that "in some aspects" it was vague, uncertain, and bore the earmarks of falsity.

Bearing in mind these representations, we advert to the question to extract the pivotal points on which the decision must hinge. We gather that it is appellant's position that as the testimony of the two witnesses as to identity was so inconclusive, the court erred when it permitted the State to introduce the gun in evidence and allowed testimony about fingerprints found on the gun which had the effect of identifying the accused or corroborating the witnesses on the matter of identity.

Best way to answer the question is to turn to the record and see just what the witnesses said about the identity of the accused and the circumstances surrounding the gun and the prints.

Before doing that we dismiss the first two assertions in the question with the observations that no motive need have been proved to justify a verdict and that the denial by the accused and his wife that the latter did not commit the crime were simply statements that the jury was justified in believing or disbelieving. The want of motive and

the assertion of appellant's innocence help us little in deciding the immediate point of law.

According to the first eye-witness, Williams, he and Johnnie Smith were cleaning cars in the street in the early morning when the appellant and a lady drove up in a Cadillac. The appellant spoke to Smith and entered an apartment building. A few minutes later the appellant returned to his car and sat in the front seat with his feet outside. The witness continued with his work, then he heard a pistol shot and looked up and saw Johnnie Smith going around one of the cars. After the first shot he saw Johnnie running and saw appellant shoot Johnnie Smith twice. Johnnie Smith fell, then the appellant looked all around and "walked * * * right over to Johnnie Benjamin [Smith] and shot him twice more," as he stood over him.

The witnesses, who were cleaning cars in the vicinity when the shooting occurred, were positive on the direct and cross-examinations, in their identification of the appellant as the one who fired the fatal shots. These witnesses freely admitted that there were inconsistencies between the testimony they were now giving and the testimony they had given on previous occasions when they were vague about the identity of the person who was firing.

The witnesses stated without hesitancy, so far as the record shows, that they had not formerly told all the truth for the simple reason that they were frightened. Several times they made this admission, and as counsel for the appellant undertook to impeach them by references to records of their testimony at the preliminary hearing and the former trial establishing the fact that they had withheld positive identification they freely acknowledged the conflicts and re-asserted that they were scared.

We are fully conscious of the potency of the argument

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that the inconsistency between a weak statement of identity at one trial and hearing and a strong identity at a later trial would indicate that the witnesses' testimony was unreliable, but it seems to us that the question of which version to accept was one for the jury, inasmuch as they pass upon the weight of the testimony and the credibility of the witnesses, and not one for the trial court or this Court to judge as a matter of law.

We do not think that the discrepancies in the tales of the identifying witnesses brings into play the rule announced, on rehearing in *Callaway* v. *State*, 112 Fla. 599, 152 So. 429, 432, that "where evidence supporting a conviction for felony bears such earmarks of falsehood and uncertainty as to amount to a legal insufficiency of the evidence to support the verdict, a new trial will be awarded by the appellate court in order that another jury may have an opportunity to pass on the evidence."

After the police arrived at the scene of the crime they arrested the appellant and took him to headquarters where his fingerprints were taken.

In a garbage can of the apartment adjoining appellant's about eight feet away, an officer saw a paper bag and upon lifting the bag, discovered a gun. He did not touch the weapon but called a police detective and they took the can to a squad car. The detective then carried it to the police station and delivered it to the supervisor of the identification bureau who photographed the gun as it lay in the can. He then took the weapon out of the can by inserting a pencil in the trigger guard, laid it on a table and dusted it for latent fingerprints. He "lifted" the prints and sent them to the Federal Bureau of Investigation in Washington. Although the police officer who first examined the prints reported that they were not appellant's, the prints were even-

tually identified as his by a fingerprint expert of the Federal Bureau of Investigation.

After carefully reviewing the evidence and digesting the question posed by the appellant, we understand that the principal error claimed to have been committed was the introduction of the revolver as evidence of identity of the accused, when no showing had been made that it was the weapon from which the fatal shots had been fired or could have been or that it was found in the possession of the accused or in the vicinity where the crime was committed. In order to reach such a conclusion it is necessary to discard the testimony of the witnesses who, at the last trial, positively identified the appellant as the person who shot Johnnie Benjamin Smith, both when he was standing, or walking, and when he was prone in the street.

Once this testimony were eliminated, the remainder would fall in the classification of circumstantial evidence, the want of motive would become important, *Bonner et al.* v. *State*, 67 Fla. 492, 65 So. 663, the continuity of the evidence of the State would be broken, and the familiar rule with reference to the quality of circumstantial evidence justifying conviction would be violated.

If no one saw the appellant fire the gun, certainly the failure to show that the bullets removed from the victim's body were fired from the gun found in the trash can would be such a break in the chain of evidence as to render the gun and testimony about it inadmissible.[2]

It could not be argued with any logic at all that if a man is found dead from gunshot wounds, a pistol found in another's possession even, would be evidence that the gun was the murder weapon and fingerprints on it were made by the murderer.

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Our trouble in following the appellant's reasoning and adopting his conclusion comes from our inability to accept his premise.

It is quite true that the witnesses who positively identified the appellant in their testimony at the last trial were so vague in their statements at the first trial that this Court, with three members dissenting, reversed the judgment.

On the last trial the witnesses admitted the discrepancies apparently without reluctance. They gave the same reason, that they were frightened. Other testimony supports the statements that they were afraid. A police officer told how one witness ran away from him and had to be captured; how the witness was finally subdued only when the officer sat upon him. The same witness tried to escape from the police station when appellant appeared there, and was restrained by an officer.

But the question is whether or not this Court can as a matter of law disregard the second stories, much as they contradict the first ones, and when that is done, hold that the admission of the gun was so improper as to constitute prejudicial error requiring a reversal.

We do not understand that such is our province.

It is elementary in our jurisprudence that the credibility of the witnesses and weight to be given their testimony are questions for the jury to determine. The conflicts between their testimony at the last trial and their testimony at the first trial and the preliminary hearing were an appropriate subject for debate and knowing as we do the talent and experience of appellant's attorney, we have no doubt that the matter was thoroughly presented on appellant's behalf.

The jury chose to believe the witnesses and, presumably, to accept the excuse given.

When the case was here before, the judgment was reversed for a new trial, largely because of the unsatisfactory nature of the identification. At this new trial this evidence became unquestionably stronger. If the jury believed it, as the jury had the right to do, the gun was properly introduced and the whole evidence justified the verdict.

In conclusion, we repeat that in an earnest effort to pass upon the correctness of the judgment with appellant's question ever before us, we are of the opinion that once the credibility of the testimony of the two witnesses is decided to have been a matter for the jury, the other elements become impotent and the challenge fails.

Affirmed.

MATHEWS, C.J., TERRELL, SEBRING, ROBERTS and DREW, J.J., CONCUR.

HOBSON, J., CONCURS SPECIALLY IN AFFIRMANCE.

HOBSON, J.,

Concurs in judgment of affirmance.

I concur in the judgment of affirmance but not without some misgiving because my study of the record persuades me to the view that the 32 Colt revolver, introduced in evidence in the State's case in chief was, or certainly might have been, considered by the jury as having been introduced for the purpose of identification of the accused as the perpetrator of the heinous crime with which he was charged. No one questions the fact that it was not admissible for such purpose. If, as I glean from the record, it were admitted as, or if the jury considered it as, the murder weapon it cannot be gainsaid that its introduction constituted harmful and prejudicial error, because no one can even speculate with any degree of certainty what the jury would have concluded upon the vital, controlling question of identity had it not been so introduced, or if it had been

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introduced *solely* and *specifically* for the purpose of showing that the accused had in his possession the means with which to commit the crime.

The only purpose for which the pistol *might* properly have been introduced would have been to show that the appellant had the means of committing the homicide. This is the main premise upon which the State resolutely stands, but the record does not suggest that such position was taken at the *trial* level.

Since it is true that reasonable minds might differ upon the question whether or not the evidence in this record is sufficient to permit a *reasonable* inference of the *probability* that the 32 Colt revolver was used to commit the crime the determination of such question would have been for the jury had the members thereof been definitely aware of the fact that the revolver was not admissible as the murder weapon but only for the purpose of demonstrating that the defendant possessed the means with which to commit the crime. But the record fails to disclose that such was the case.

It is indeed a serious matter for any citizen to be deprived of his liberty for the remainder of his life—particularly, as in this case, where it is more than possible that the jury unwittingly considered circumstantial evidence for an improper purpose.

I would vote to reverse the judgment and grant a new trial if the error which I have pointed out were, as the one in the first trial of this case, fundamental rather than procedural. Moreover, in this the second trial of this case, an able experienced trial judge has placed his stamp of approval upon the jury's verdict. I am therefore impelled to cast aside the doubt which the record raises in my mind that appellant had a fair and impartial trial and concur in the judgment of affirmance.